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In the Supreme Court of the United States

OCTOBER TERM, 1975

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (App. 157–169) is reported at 497 F. 2d 1172. The opinion of the district court (App. 129–149) is reported at 362 F. Supp. 360.

JURISDICTION

The judgment of the court of appeals (App. 172–173) was entered on June 5, 1974. The petition for a writ of certiorari was filed on September 3, 1974, and was granted on March 17, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 118 of the Clean Air Act, as amended in 1970, requires that federal facilities with air emission sources obtain permits from the state air pollution control commission in order to continue operating or whether Section 118 requires only that federal facilities comply with state air emission standards or limitations.

STATUTES AND REGULATION INVOLVED

Section 118 of the Clean Air Act ("the Act"), as amended in 1970, 84 Stat. 1689, 42 U.S.C. 1857f, is reproduced in petitioner's brief at page 8.

Section 304 of the Act, 84 Stat. 1706, 42 U.S.C. 1857h–2, is reproduced in petitioner's brief at pages 9–11.

Section 5(1) of Kentucky Air Pollution Control Commission Regulation AP–1 states in pertinent part:

> No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

STATEMENT

A. Petitioner's Complaint

Petitioner, the Commonwealth of Kentucky, by and through its Attorney General, brought this suit on November 16, 1972, in the United States District Court for the Western District of Kentucky against

the Environmental Protection Agency (E.P.A.), its Administrator and its Regional Director; the Department of the Army, its Chief of Staff, its Secretary, the Commanding Generals of Fort Knox and Fort Campbell and the Commanding Officer of the Lexington-Blue Grass Army Depot; the Tennessee Valley Authority (T.V.A.), the Chairman of its Board of Directors, its General Manager and the Superintendents of T.V.A.'s Shawnee Power Plant and Paradise Power Plant; the Atomic Energy Commission (A.E.C.), the Chairman of its Board of Directors, its General Manager, the Manager of the A.E.C.'s Paducah Gaseous Diffusion Plant, and Union Carbide Corporation, which operated the A.E.C.'s plant.[1] (App. 1–6, 9–14.)

Petitioner alleged that the Army, T.V.A. and A.E.C. respondents operated facilities within the state that contained air polluting equipment; that although requested to do so, these respondents had refused to apply to the Kentucky Air Pollution Control Commission for permits, as required by the Commission's regulations; that these regulations were part of the state's plan to achieve and maintain primary and secondary ambient air quality standards, which plan E.P.A. had approved pursuant to the Clean Air Act,

[1] The Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA) succeeded to the powers of the Atomic Energy Commission on January 19, 1975, pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233–1254; see 40 Fed. Reg. 3242, 3520. While ERDA now has responsibility for the Paducah Gaseous Diffusion Plant, which continues to be operated by the Union Carbide Corporation under contract, in this brief we shall continue to refer to "A.E.C." respondents for the purpose of clarity.

as amended ("the Act"); and that respondents had violated Section 118 of the Act, 42 U.S.C. 1857f, which required federal facilities to comply with the state's permit regulations (App. 17–23). Petitioner further alleged that although the Administrator of E.P.A. is empowered under Section 113 of the Act, 42 U.S.C. 1857c–8, to commence appropriate action against any person who violates a state implementation plan, the Administrator had refused to do so with respect to the other respondents and that this refusal was "so arbitrary, capricious, unlawful, and unwarranted as to deprive the citizens of [Kentucky], due process and equal protection of the law * * *" (App. 25).

B. The Background of Petitioner's Complaint

The background of petitioner's complaint is as follows. The Clean Air Act Amendments of 1970, Pub. L. 91–604, 84 Stat. 1676, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," but recognized that each state had "the primary responsibility for assuring air quality within the entire geographic area comprising such State." Section 107(a) of the Act, 42 U.S.C. 1857c–2(a). *Train* v. *Natural Resources Defense Council,* No. 73–1742, decided April 16, 1975, slip op. at 2. Pursuant to the Act, the Administrator of the Environmental Protection Agency established national primary and secondary standards for "ambient air"[2] and the state submitted plans to E.P.A. designed to implement and maintain these standards within their respective boundaries, as required by Section 110(a)(1) of the Act, 42 U.S.C. 1857c–5(a)(1).

[2] "Ambient air" is "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. 50.1(e). See generally 40 C.F.R. Part 50.

1. The Regulations of the Kentucky Air Pollution Control Commission Relating to Operating Permits

The Commonwealth of Kentucky submitted its implementation plan to E.P.A. and the Administrator approved portions of the plan, while disapproving others. 37 Fed. Reg. 10842, 10868–10869.[3] Relevant here are the approved Kentucky regulations embodied in the plan that relate to the granting of an operating permit, which the state defines as "the permission, in whatever form given, of the [Kentucky Air Pollution Control] Commission to construct, alter, use, operate, or maintain an air contaminant source."[4]

Kentucky Air Pollution Control Commission Regulation No. AP–1, Section 5(1), effective April 9, 1972, provides as follows (Pet. App. 46a):

> No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned →

[3] The United States Court of Appeals later vacated the Administrator's approval of Kentucky's plan on the ground that interested parties were not given an opportunity to participate in the Administrator's consideration of the plan. *Buckeye Power, Inc.* v. *Environmental Protection Agency,* 481 F. 2d 162 (C.A 6).

Kentucky thereafter resubmitted its plan and the Administrator approved it on August 15, 1974. 39 Fed. Reg. 29357.

[4] Kentucky Air Pollution Control Commission Regulation No. AP–10, Section 2(2). (This regulation is set forth at page 209 of petitioner's appendix in the court of appeals (hereafter "A.").)

> by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

The permit application must be on a form provided by the state Commission and must contain certain information "when specifically requested by the Commission," including an "analysis of the characteristics, properties, and volume of the air contaminants based upon source or stack samples of the air contaminants taken under normal operating conditions." [5]

Each application for a permit is reviewed by the Executive Secretary of the Air Pollution Commission, who either grants or denies the application.[6] Prior to taking such action the Executive Secretary is required to direct the holding of a formal hearing upon the request of the applicant; a hearing may also be held at the Executive Secretary's own request.[7] Also, the "Executive Secretary will direct the holding of a formal hearing upon receipt of a written request therefor from the applicant or intervenor filed within thirty (30) days after the grant or denial of a permit." [8] Any person "whose interests may be affected by a proceeding" may file a petition to intervene; if the petition is granted, the intervenor becomes a party for all purposes.[9]

[5] Section 5(2)(c) of the Kentucky Air Pollution Control Commission Regulation AP-1 (A. 120); Regulation AP-10, Section 3 (A. 210).

[6] Regulation AP-10, Sections 3 and 4 (A. 210).

[7] Regulation AP-10, Section 4(2) (A. 210).

[8] Regulation AP-10, Section 4(2) (A. 210).

[9] Regulation AP-10, Sections 15 and 16 (A. 216-217).

A permit application will be denied if the applicant has failed to supply "information required or deemed necessary by the Commission to enable it to act upon the permit application." [10] A permit to construct or operate will likewise be denied when "the air contaminant source will prevent or interfere with the attainment or maintenance of state or federal air quality standards." [11] If the permit is granted, it is "subject to such terms and conditions set forth and embodied in the permit as the Commission shall deem necessary to insure compliance with its standards." [12]

Upon denial of an application for a permit after a hearing, the applicant apparently may seek judicial review by maintaining "a special proceeding in equity in the circuit court of the county"; the applicant is entitled to a trial *de novo* and may appeal any adverse decision to the Court of Appeals of Kentucky. 4 Kentucky Rev. Stat. 77.305 and 77.280 (1971).

2. THE RESPONSE OF THE FEDERAL FACILITIES TO THE STATE COMMISSION'S REQUEST THAT THEY APPLY FOR STATE PERMITS

The Kentucky Air Pollution Commission apparently believed that its permit regulations applied to federal facilities, although it is not obvious on the face of the regulations that such facilities are included.[13] In the summer of 1972, shortly after Kentucky's implementation plan became effective, an of-

[10] Regulation AP-1, Section 5(2)(c) (A. 120).

[11] Regulation AP-1, Section 5(3)(a) (A. 121).

[12] Regulation AP-1, Section 5(4) (A. 121).

[13] The regulations do not specifically mention federal facilities and Section 5(2)(b) of Regulation AP-1, which sets forth the

ficial of the state's Air Pollution Control Commission wrote to the Army, T.V.A. and A.E.C. respondents requesting them to submit permit applications to the Commission in regard to their facilities within the state (App. 35–59). These federal facilities included the United States Army Armor Center and Fort Knox, the Lexington-Bluegrass Army Depot, and Fort Campbell (headquarters of the 101st Airborne Division); the A.E.C.'s Gaseous Diffusion Plant, Paducah, Kentucky, which is one of three production facilities of the United States operated to supply the national need for enriched uranium (App. 92); and the T.V.A.'s Shawnee Power Plant and Paradise Power Plant (App. 129 n. 1).

The Army, T.V.A. and A.E.C. respondents replied to these requests by stating that federal facilities located within Kentucky were not required to apply to the state's Air Pollution Control Commission for an operating permit (App. 37–79). However, respondents expressed their desire to cooperate fully with the

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procedures for submitting permit applications, does not clearly cover facilities of the federal government (A. 120):

> Applications for permits shall be signed by the corporate President, his authorized agent; or by an equivalently responsible officer in the case of organizations other than corporations; or, in other cases, by the source owner or operator; or, in the case of political subdivisions, by the highest elected official of such subdivision. Such signature shall constitute personal affirmation that the statements made in the application are true and complete.

Section 5(1), however, seems broad enough to include federal installations since it requires each "person" to obtain a permit and person is defined by Section 2(32) of Regulation AP-1 (A. 111) to include any "government agency."

Commission in the implementation of the Kentucky plan to abate air pollution.

Thus, for example, the Commanding Officer of the Lexington-Blue Grass Army Depot, in his letter to the state Commission, described the steps taken by the depot to abate air pollution and extended the following invitation: "representatives from state and local environmental pollution control agencies may visit our facilities, may examine operating records and may conduct tests provided security restrictions are met and the visitors are accompanied by applicable representatives designated by Headquarters, US Army Materiel Command, Washington, D.C." (App. 44–45). The Commanding Officer of Fort Campbell stated his desire "to cooperate in every way possible with [the Commission]," "enclosed * * * pertinent information on [the Fort's] heating plants which appear to be covered by [the Commission's] regulations," and requested the Commission to inform him "if any further information is desired" (App. 48).

Similarly, the T.V.A., although declining to apply formally for operating permits, supplied the Commission "with the same emission data and other information for TVA's Paradise and Shawnee power plants which [the Commission's] permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations" (App. 52; A. 369–518).

The A.E.C. likewise supplied to the state Commission the information and data requested on the permit application form and stated that although it was not bound to apply for an operating permit, it shared

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"with the State a deep interest in preventing and abating both air and water pollution problems and [was] happy to cooperate as a matter of comity with the Kentucky Air Pollution Control Commission" (App. 37–38).

3.THE ADVICE GIVEN TO FEDERAL FACILITIES BY THE ENVIRONMENTAL PROTECTION AGENCY

On October 17, 1972, after further exchanges of correspondence between respondents and the state Commission, the Regional Administrator of E.P.A. sent a letter to all federal facilities in the region, including those operated by respondents, and to the Director of the Kentucky Air Pollution Control Commission (App. 55–59, 79–82). This letter set forth the policy of E.P.A. and its interpretation of Section 118 of the Act, 42 U.S.C. 1857f, which the state Commission had invoked as the basis for requiring respondents to apply for operating permits. The E.P.A. Regional Administrator stated that Section 118 required federal facilities "to meet state air quality standards and emission limitations and to comply with deadlines established in the approved state air implementation plans" (App. 57). Also, each federal facility should develop a compliance schedule and should provide data requested by the state so long as the request is "reasonable and specific" (*id.* at 58). "However," the letter concluded, E.P.A. does "not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit applica-

tion that will lead automatically to issuance of a state permit or license" (*ibid.*).[14]

C. THE PROCEEDINGS BELOW

One month later, petitioner instituted this action seeking, *inter alia,* a mandatory injunction against the Army, T.V.A. and A.E.C. respondents to compel them to apply for operating permits pursuant to Section 5 of the Kentucky Air Pollution Control Commission's Regulation AP-1 (App. 31).[15] On cross-motions for summary judgment, the district court ruled in favor of respondents and ordered petitioner's action dismissed (Pet. App. 1a–21a), holding that the language in Section 118 of the Act, 47 U.S.C. 1857f, which instructs federal facilities of the executive, legislative and judicial branches to comply with state "requirements respecting control and abatement of air pollution," refers only to the applicable state and local emission standards and compliance schedules (*id.* at 4a–9a).

The court of appeals affirmed. Reading the language of Section 118 in light of other provisions of the Clean

[14] The E.P.A. Regional Administrator's letter and the interpretation of Section 118 of the Act embodied therein followed the interpretation given that provision by the E.P.A. Administrator in his instructions to all regional administrators in 1972.

[15] The Chairman of the State Commission advised the General Manager of T.V.A. that "[t]his action [the suit] was taken independent of the Commission, and the decision of whether or not to pursue a formal legal action on this matter is now obviously out of our hands. I regret that such action has been taken before the benefit of your response to our earlier inquiry" (App. 77). (The district court held that the state Attorney General could sue without a request from the Commission although "the matter is not free from doubt" (Pet. App. 19a).)

Air Act, as amended in 1970, including Section 304 (42 U.S.C. 1857h–2), which allows enforcement suits to be brought against the federal government, and in light of the legislative history of Section 118 and its purposes, the appellate court concluded that (Pet. App. 33a–34a):

> We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit requirements. Congress did commit the United States to compliance with air quality and emission standards, and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end. The national dedication to improvement of the environment by prevention and control of air pollution is in no way impeded by exempting federal agencies from the permit requirement of Administrative Regulation No. AP–1, § 5.

In reaching its conclusion, the appellate court also noted that the Supremacy Clause of the Constitution and the doctrine of sovereign immunity were involved since a holding that federal facilities must obtain state permits in order to operate would be so marked a departure from established principles of federalism that a court should not lightly infer that Congress intended this result (*id.* at 29a–30a).

In *State of Alabama* v. *Seeber,* 502 F.2d 1238 (C.A. 5), petition for a writ of certiorari pending, *sub nom. Seeber* v. *Alabama,* No. 74–851, another court of appeals, with one judge dissenting, reached the opposite conclusion, holding that the language of Section 118

indicated that Congress intended federal facilities to comply with state permit regulations and that any contrary implications in other provisions of the Act and Section 118's legislative history were ambiguous.

SUMMARY OF ARGUMENT

Both petitioner and respondents agree that under Section 118 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857f, federal facilities must comply with state air pollution emission standards or limitations and compliance schedules. Focusing on the Section 118 phrase "requirements respecting control and abatement of air pollution," petitioner argues further that federal facilities must seek and obtain operating permits from the state air pollution control commission. In our view, however, the term "requirements" in Section 118 refers only to emission standards or limitations, which the Act defines to include compliance schedules, and does not comprehend state permit procedures.

The term "requirements" is nowhere defined in the Act. However, it is used in various sections throughout the Act, including the provision that authorizes extensions of time in order to meet "requirements" of state implementation plans because the technology needed for compliance is unavailable. 42 U.S.C. 1857c–5. In context, this reference to "requirements" comprehends emission standards or limitations, not state permit procedures, and recently this Court so assumed when it discussed the provision in *Train* v. *Natural Resources Defense Council, supra.*

Moreover, in another section the Senate bill, from

which Section 118 is substantially derived, clearly distinguished between emission "requirements" and "permit" procedures in setting forth the provisions that should be contained in an acceptable state plan for implementing and maintaining national air quality standards. This distinction is of course entirely consistent with our reading of the present Section 118.

In two sections of the Act dealing with new stationary sources and hazardous pollutants, which were added by the 1970 amendments, Congress specifically referred to state "procedures" for implementing standards set by the E.P.A. Administrator. Yet in both instances Congress expressly provided that such state implementation procedures (as distinguished from emission standards or limitations) could not be applied to federal facilities. 42 U.S.C. 1857c–6, 1857c–7.

Most significantly, Section 304, which authorizes states to sue to enforce provisions of their implementation plans against federal facilities, provides for such suits only in regard to violations of emission standards or limitations. 42 U.S.C. 1857h–2. As revealed by an examination of the Senate version of Section 118 and the changes made by the Conference Committee in it and in Section 304, one of Congress' purposes in enacting Section 304 was to give the states a mechanism for enforcing Section 119. Therefore, the term "requirements" in Section 118 cannot be read to include state permit procedures since it would be unreasonable to believe that Congress imposed upon federal facilities a duty to obtain such permits and yet completely neglected to furnish the states with any enforcement tool to assure that federal facilities fulfill that duty.

B

The legislative history of Section 118 reveals that, with respect to federal facilities, both the House and the Senate had passed bills to require more stringent air pollution control and abatement. While the House version of Section 118 spoke in terms of federal facilities complying with state emission "standards," the Senate version used the term "requirements." But the Conference Committee, when it consolidated the House and Senate versions to produce the present Section 118, perceived no difference between the two and stated in its report that both required compliance with state emission standards. This is hardly surprising since the Senate report on the bill described its proposed Section 118 as requiring federal facilities to meet state "emission standards."

On the other hand, if petitioner's interpretation of Section 118 were correct, there would have been a significant disagreement between the House bill, which referred to "emission standards," and the Senate amendments, which referred to "requirements." Yet such a disagreement was in no way mentioned by the Conference Committee. That in itself would be surprising, but the Conference Committee's silence on the point would be all the more remarkable in light of the fact that the interpretation petitioner urges is such a sharp break with tradition, as embodied in two centuries of decisions by this Court making clear that unless Congress clearly provides otherwise, the states have no power to require federal agencies to obtain state licenses in order to conduct activities within state borders.

Moreover, as the Act provides, it is generally the states' responsibility to control air pollution from emission sources within their jurisdiction; one of the ways a state may choose to do this is through a permit program. Yet the Conference Committee report explicitly states that in regard to federal facilities it is the President's responsibility to assure that emission limitations and standards are met. This indicates still further that federal facilities are not required to obtain state operating permits.

C

The E.P.A. Administrator is charged with the duty of administering the Clean Air Act and his interpretation of the Act is entitled to great weight, as the Court recently held in *Train* v. *Natural Resources Defense Council, supra.* In regard to Section 118, the E.P.A.'s interpretation is that federal facilities are not required to obtain state operating permits; prior to the filing of this suit, E.P.A. so advised all federal agencies in Kentucky, including respondents in this case.

In addition, the President has the responsibility for assuring compliance by federal facilities with Section 118 and, in an Executive Order, the President, too, has interpreted that section as not subjecting such facilities to state permit procedures.

E.P.A. recently promulgated rules to implement the President's Executive Order with respect to air pollution by federal facilities. These E.P.A. rules set forth detailed reporting, monitoring and compliance procedures. Whether another system of assuring federal compliance, such as requiring federal facilities to

obtain state permits, is desirable, is a matter for Congress to decide. The Administrative Conference of the United States recently recommended that rather than subjecting federal facilities to state permit procedures, the most appropriate course is to vest control and authority over all aspects of environmental pollution by the federal government in a single federal agency, which should consider the need for setting up a federal permit program. The wisdom of this proposal is likewise ultimately for Congress to decide.

ARGUMENT

Section 118 of the Clean Air Act, as Amended in 1970, Does Not Require Federal Facilities To Seek and Obtain State Air Pollution Control Permits in Order To Operate Within the State

In this case the Court has the task of resolving—in Mr. Justice Frankfurter's words—a "contest between probabilities of meaning"[16] of Section 118 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857f, which provides in full:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency,

[16] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947).

or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

Petitioner argues that the language in the first sentence of Section 118—"shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements"—means that facilities of the executive, legislative and judicial branches of the federal government must comply not only with state emission standards and compliance schedules, but also with state procedures that demand that emission sources—including federal facilities—obtain operating permits (Pet. Br. 18–39).

We contend, however, that the phrase means only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable emission standards and compliance schedules [17] promulgated by the particular state pursuant to their E.P.A.-aproved plan to establish and maintain national air quality standards. See Sections 109 and 110 of the Act, 42 U.S.C. 1857c–4 and 1857c–5.

Petitioner, stressing the words "requirements respecting control and abatement of air pollution" in Section 118, asserts that it is "clear and unambiguous" that state permit procedures are comprehended, so much so that it is unnecessary for the Court to look beyond this particular language (Pet. Br. 26–27). But despite petitioner's insistence on the "plain meaning" of Section 118 (*id.* 16, 23, 26–27), that provision cannot be considered in isolation; language gains meaning from its context and an important part of that context is the statute as a whole and the history that preceded it. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543–544; see also *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41, 48; *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250; *Cass* v. *United States*, 417 U.S. 72, 77–79.

As we discuss below, in light of other provisions of the Clean Air Amendments of 1970 and the relevant

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[17] Under Section 304(f)(1), 42 U.S.C. 1857h-2(f)(1), "emission standard or limitation" means "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard."

legislative history, the meaning of the phrase petitioner emphasizes is hardly a clear command that federal facilities must seek state operating permits. Indeed, a fair reading of the statute as a whole leads, we believe, to the firm conclusion that federal facilities need not obtain state permits in order to operate. This is the conclusion reached by E.P.A. in 1972 and by the President in the Executive Order implementing Section 118.

A. WHEN READ IN VIEW OF THE ACT AS A WHOLE, THE LANGUAGE IN SECTION 118 DIRECTING FEDERAL FACILITIES TO COMPLY WITH STATE AIR POLLUTION "REQUIREMENTS" MEANS ONLY THAT SUCH FACILITIES MUST MEET STATE EMISSION STANDARDS OR LIMITATIONS

Neither the word "requirements" in Section 118 nor the phrase "requirements respecting control and abatement of air pollution" are defined in the Act. The phrase itself, however, is used in Section 116 of the Act, 42 U.S.C. 1857d–1, which provides in part that states retain authority to "adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) *any requirement respecting control or abatement of air pollution*" (emphasis added).[18] As it appears in Section 116, the italicized

[18] Section 116 continues with an exception that has the effect of forbidding states from imposing emission standards that are less stringent than those in effect in an applicable implementation plan or under Sections 111 or 112, 42 U.S.C. 1857c–6 and 1857c–7.

Section 116 was added by the Conference Committee. See H.R. Rep. No. 91–1783, 91st Cong., 2d Sess. 48 (1970). (The Legislative History of the Clean Air Amendments of 1970 is compiled in two volumes by the Library of Congress for the Senate Committee on Public Works, Ser. No. 93–18, 93d Cong., 2d Sess. (1974).)

phrase obviously does not refer to emission standards; yet the one area of agreement between the parties in this case is that the same phrase, as used in Section 118, does refer to such standards. Section 116 thus offers little guidance on the meaning of Section 118.

As to the term "requirements" in Section 118, this also appears in other sections of the Act[19] and, as this Court has reminded, the "connotation of a term in one portion of an Act may often be clarified by reference to its use in others." *United States* v. *Cooper Corp.*, 312 U.S. 600, 606. Section 110(e)(1)(A), for instance, authorizes the E.P.A. Administrator to extend for two years a state's three-year deadline for attaining a national primary air quality standard[20] if he determines, upon timely application by the state's Governor, that an emission source is unable to meet "the *requirements* of such plan which implement such primary standard because the necessary technology" is unavailable (emphasis added). As used in Section 110(e)(1)(A), "requirements" rather plainly refers to emission standards and compliance schedules; it just as clearly does not refer to state procedures for obtaining a permit, which scarcely demand technological sophistication.

[19] *E.g.*, Section 110(e)(1)(A), 110(e)(2)(A), 110(f)(1), 110(f)(1)(B), 42 U.S.C. 1857c-5(e)—1857c–5(f); Section 113(a)(1), 113(a)(2), 113(a)(2)(A), 113(a)(3), 113(b)(2), 113(c)(1)(A), 42 U.S.C. 1857c–8(a)—1857c–8(c); Section 114(a), 42 U.S.C. 1857c–9(a); Section 313(2), 42 U.S.C. 1857j–2(2).

[20] Section 110(a)(2)(A)(i), 42 U.S.C. 1857c–5(a)(2)(A)(i), discussed in *Train* v. *Natural Resources Defense Council*, *supra*, slip op. at 22–23.

Accordingly, when the Court recently discussed Section 110(e)(1)(A) in *Train* v. *Natural Resources Defense Council, supra,* slip op. at 22–24, it treated the two-year extension for complying with implementation plan "requirements" as dealing with emission limitations.[21] And this definition of "requirements" as used in Section 110(e)(1)(A) is, of course, the same meaning we contend the term has in Section 118.

Moreover, in listing the necessary aspects of state implementation plans, the Senate bill[22] from which Section 118 is substantially derived, as we later discuss, distinguished between "emission *requirements*" and compliance schedules, on the one hand, and "appropriate procedures, including, but not limited to * * * *permits*" for the operation of the emission source,[23] on the other hand. Again, this is entirely consistent with our reading of Section 118 that it imposes the obligation on federal facilities to meet state emission standards but does not impose the duty to obtain state operating permits.

Thus far we have attempted to adhere to Mr. Justice Cardozo's instruction that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to

[21] See also the Court's treatment of Section 110(f), 42 U.S.C. 1857c–5(f), which concerns postponements for meeting "requirements." Slip op. at, *e.g.*, 21.

[22] S. 4358, 91st Cong., 2d Sess. (1970).

[23] Compare *id.* Section 111(a)(2)(B) with *id.* Section 111(a)(2)(D) (emphasis added). The Senate report made a similar distinction. S. Rep. No. 91–1196, 91st Cong., 2d Sess. 12 (1970).

the end in view."[24] Our interpretation of Section 118 is, we believe, supported by the provisions of the Act we have considered to this point. There are still other sections of the Act that confirm our view, but before turning to these we should add a word about the language in Section 118 that directs federal facilities to comply with state air pollution requirements "to the same extent that any person is subject to such requirements." Despite petitioner's assertions to the contrary (Brief 20, 34–35), the quoted phrase is of scant assistance in determining what Congress meant by "requirements": it tells only to what extent federal facilities must comply with the applicable state provisions but does not say which state provisions are applicable.

As to the other sections of the Clean Air Act, as amended in 1970, that are pertinent here, the most prominent are Section 111, 112 and Section 304.[25] Section 111 deals with standards of performance for "new stationary sources," that is, buildings or other facilities that are constructed or modified after a certain time.[26] For such new sources, the E.P.A. Administrator was to promulgate regulations setting standards of performance,[27] but under Section 111(c)(1) the states could develop their own "procedure" for

[24] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 439 (dissenting). See also *Duparquet Co.* v. *Evans*, 297 U.S. 216, 218; *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, No. 73–1380, decided March 3, 1975, slip op. 7–8, and cases there cited; Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 207 (1967).

[25] 42 U.S.C. 1857c–6, 1857c–7, 1857h–2.

[26] See Section 111(a)(2), 111(a)(3), 111(b)(1), 42 U.S.C 1857c–6(a)(2)–1857c–6(b).

[27] As he did. See 40 C.F.R. Part 60.

implementation and enforcement. If the Administrator finds the state "procedure" adequate, he may delegate his authority to the state *"except with respect to new sources owned or operated by the United States." Ibid.* (emphasis added). This exception in Section 111 confirms that although Congress intended all federal facilities to meet state emission standards, it did not intend to make such facilities submit to state permit procedures—which is, of course, our view of Section 118.[28]

Similarly, Section 112 deals with national emission standards for hazardous air pollutants [29] and like Section 111 allows the states to develop their own "procedure" for implementing and enforcing standards promulgated by the E.P.A. Administrator. But again, when Congress had the opportunity to subject federal facilities to such state implementation procedures, it excluded "stationary sources owned or operated by the United States." Section 112(d)(1), 42 U.S.C. 1857c–7(d)(1).

Finally, Section 304 of the Act, 42 U.S.C. 1857h–2, indicates still further that federal facilities are not

[28] While no "new stationary sources" of the federal government are directly involved in this case, we should point out that Section 5(1) of the Kentucky regulations (see pp. 5–6, *supra*) requires a permit before any emission source can be constructed or modified; under Section 111(e)(1) of the Act this portion of the permit regulation is plainly inapplicable to new federal sources and illustrates further why the term "requirements" in Section 118 cannot be read to include any provision in a state implementation plan that applies to non-federal facilities.

[29] Defined as air pollutants to which no ambient air quality standard is applicable and which may cause an increase in mortality or "serious irreversible, or incapacitating reversible, illness." Section 112(a)(1), 42 U.S.C. 1857c–7(a)(1).

subject to state permit procedures. Section 304(a)(1) allows "any person" to commence an action against the United States in federal court to enforce "an emission standard or limitation under this Act" or an order issued by the state or the E.P.A. Administrator "with respect to such a standard or limitation." Section 304 is the sole mechanism in the Act for states to remedy non-compliance by federal facilities with Section 118.[30]

In defining the "emission standards or limitations" that can be enforced under Section 304, Congress specifically referred to Section 118 "requirements." [31] And Congress also provided that a Section 304 suit may be brought by "any person," which is defined to include a state or a political subdivision of a state.[32]

Indeed, that Congress intended the states to utilize Section 304 to enforce Section 118 [33] is illustrated by the fact that the Senate's version of Section 118, which was substantially enacted, contained a subsection pro-

[30] Section 113, 42 U.S.C. 1857c–8, authorizes the E.P.A. Administrator to take enforcement action against violators. Also, the states are not precluded from utilizing actions in state courts to enforce their implementation plans.

[31] Section 304(f)(1), 42 U.S.C. 1857h–2(f)(1) (emphasis added):

> For purposes of this section, the term "emission standard or limitation under this Act" means—
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, * * *
> * * * * * *
> which is in effect under this Act (*including a requirement applicable by reason of section 118*) or under an applicable implementation plan.

[32] Section 302(e), 42 U.S.C. 1857h(e).

[33] See Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 663 (1973), reaching the same conclusion.

viding that the "Governor, the attorney general or any citizen of any State in which any Federal property, facility, or activity is located may seek to enforce the provisions of this section [Section 118] pursuant to section 304 of this Act." [34] The Conference Committee [35] eliminated this subsection without comment but retained in its stead the provision from the Clean Air Act of 1963 defining "person" to include a state [36] and added the parenthetical phrase in Section 304(f)(1), quoted in note 31, *supra,* making clear that Section 118 was to be enforced through a Section 304 suit.[37]

Since there is no room for doubt that one of the purposes of Section 304 was to give the states the means to enforce Section 118 in federal court against federal facilities, it is highly significant that the enforceable Section 118 "requirements respecting control and abatement of air pollution" are emission standards or limitations and orders regarding them, not state procedural regulations requiring operating permits. Section 304 thus plainly indicates, as the court below held (Pet. App. 29a), that Congress believed Section 118 demanded only that federal facilities comply with such state standards or limitations. Section 118 thus could not have been intended to require

[34] S. 4358, 91st Cong., 2d Sess. (1970) (Sec. 7).

[35] H.R. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970).

[36] 42 U.S.C. (1964 ed.) 1857h(e).

[37] Petitioner, as did the court in *Alabama* v. *Seeber*, *supra*, 502 F. 2d at 1248, seems to suggest that Section 304 is inapposite because it has as its caption "Citizen Suits." But the heading "cannot be used to extend or to restrain any positive provisions contained in the body of the act." *Hadden* v. *The Collector*, 5 Wall. 107, 111; *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26.

federal facilities to obtain state permits, as petitioner contends. There is, we submit, simply no reasonable explanation why Congress would have decided to impose such a duty on federal facilities and yet at the same time refuse to provide the states with a Section 304 remedy for noncompliance.

B. THE LEGISLATIVE HISTORY OF SECTION 118 CONFIRMS THAT CONGRESS DID NOT INTEND TO ALTER THE TRADITIONAL FEDERAL-STATE RELATIONSHIP BY REQUIRING FEDERAL FACILITIES TO OBTAIN STATE OPERATING PERMITS

If there remains any degree of doubt about the proper interpretation of Section 118, even this is removed upon examination of the legislative history of that provision. Both the House bill [38] and the Senate amendment,[39] which resulted in the Clean Air Amendments of 1970, contained provisions to strengthen the strictures against air pollution by federal facilities. After considering both versions, the Conference Committee, in its report, stated the following in regard to the final version of Section 118: [40]

> The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions.

[38] H.R. 17255, 91st Cong., 2d Sess. (1970) (Sec. 10, amending Section 111 of the Clean Air Act of 1963).

[39] S. 4358, 91st Cong., 2d Sess. (1970) (Sec. 7, amending Section 111 of the Clean Air Act of 1963 (42 U.S.C. 1857f), redesignated as Section 118).

[40] H.R. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. 48 (1970).

> The conference substitute modifies the House provision to require that the President rather than the Administrator be responsible for assuring compliance by Federal agencies.

Two things are important about the Conference Committee's statement.

1. First, the Conference Committee, in describing the effect of the House and Senate versions of Section 118, stated that there was agreement that federal facilities must comply with applicable emission standards and limitations, which is, of course, our interpretation of Section 118. In regard to what this provision would demand of federal facilities, the Conference Committee significantly indicated no area of disagreement between the House and Senate.

The Senate version contained language which is similar to that now embodied in Section 118: federal facilities "shall comply with the requirements of this Act in the same manner as any person must so comply in the administration of such property, facility, or activity."[41] In its Report, the Senate described the effect and purpose of this language as follows: "This section [118] requires that Federal facilities meet the *emission standards* necessary to achieve ambient air quality standards as well as those established in other sections of Title I." S. Rep. No. 91–1196, 91st Cong., 2d Sess. 23 (1970) (emphasis added).

The House version, which is also reflected in the present Section 118, provided as follows: federal facil-

[41] See note 39, *supra*.

ities "shall comply with applicable Federal, State, interstate, and local emission standards * * *."[42] The House Report stated that this would "direct Federal agencies in the executive, legislative, and judicial branches to comply with applicable Federal, State, interstate, and local *emission standards.*" H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. 14–15 (1970) (emphasis added).

Thus, although the Senate version spoke in terms of "requirements," as the final Section 118 does, while the House version talked of "emission standards," it is hardly surprising that the Conference Committee perceived no difference between the two;[43] in formulating what became Section 118, the Committee therefore simply combined the House and Senate provisions.

If the Conference Committee had thought that the Senate amendment and its use of the term "requirements" would subject federal facilities to state permit procedures, while the House bill would not, it is difficult to imagine why the Committee would not have alluded to this, particularly in light of the Supremacy Clause of the Constitution[44] and two centuries of precedent holding that states have no power to require

[42] See note 38, *supra*.

[43] Moreover, it was quite logical for the Conference Committee to read the term "requirements" in the Senate amendment as equivalent to emission standards since, as we discussed earlier (p. 22, *supra*), the Senate used "emission requirement" and "emission standard" interchangeably throughout its entire bill.

[44] Article VI, clause 2. See also Article I, sec. 8, cl. 17, in regard to exclusive federal jurisdiction over forts, arsenals and other federal buildings within states.

licenses for federal activities to be conducted within their borders. See *McCulloch* v. *Maryland,* 4 Wheat. 316; *Ohio* v. *Thomas,* 173 U.S. 276; *Johnson* v. *Maryland,* 254 U.S. 51 (state has no power to require federal employee driving on the state's roads to obtain a state license); *Arizona* v. *California,* 283 U.S. 423, 451; *Mayo* v. *United States,* 319 U.S. 441; *Federal Power Commission* v. *Oregon,* 349 U.S. 435; *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187. Indeed, this Court recently affirmed a decision of a court of appeals holding that a state pollution control agency could not regulate, through a permit system, radioactive discharges (both air and water) from an A.E.C.-regulated nuclear power plant. *Northern States Power Co.* v. *Minnesota,* 447 F. 2d 1143 (C.A. 8), affirmed, 405 U.S. 1035.[45]

2. The second point of importance in the quoted statement of the Conference Committee report is that the Committee made the President responsible for assuring compliance by federal facilities with Section 118. This is still another indication that Congress did not contemplate requiring federal facilities to obtain state operating permits. In regard to non-federal facilities, the states have the responsibility for assuring compliance, and the Act specifically so provides;[46] the

[45] It is therefore well-established, as the cases cited illustrate, that state regulations or laws cannot, of their own force, require federal facilities to obtain permits in order to operate within the state; the states may exercise such authority only if Section 118 of the Act authorizes it. In this regard, Section 116 of the Act, 42 U.S.C. 1857d-1, provides only that the states retain whatever authority for controlling air pollution they otherwise would have.

[46] Section 101(a)(3), 42 U.S.C. 1857(a)(3).

states, of course, may fulfill this responsibility by devising permit procedures, as Kentucky has done. But in regard to federal facilities, state permits are not required and the President has the primary duty to ensure compliance, as the Conference Committee stated.

In sum, the legislative history of Section 118 confirms our view of the meaning of the statute and this, together with the analysis of the other provisions of the Act set forth above, leads to the firm conclusion that under Section 118 federal facilities are obliged only to comply with applicable state emission standards and limitations.

C. BOTH THE ENVIRONMENTAL PROTECTION AGENCY, WHICH IS CHARGED WITH THE ADMINISTRATION OF THE ACT, AND THE PRESIDENT, WHO IS RESPONSIBLE FOR ASSURING COMPLIANCE BY FEDERAL FACILITIES WITH SECTION 118, HAVE INTERPRETED THAT PROVISION TO MEAN ONLY THAT SUCH FACILITIES MUST MEET STATE EMISSION STANDARDS AND LIMITATIONS AND THIS INTERPRETATION IS ENTITLED TO GREAT WEIGHT

As the statement of facts in this case indicates (pp. 10–11, *supra*), in 1972 E.P.A. stated its view, before petitioner filed suit, that federal facilities were not required to obtain state operating permits and the E.P.A. Regional Administrator so advised all federal facilities in his region, including those involved in this case. (See also the 1973 letter from the E.P.A. Administrator, App. 84.) E.P.A has continued to adhere to this interpretation of Section 118.

On May 6, 1975, the E.P.A. Administrator published in the Federal Register a detailed set of guidelines for federal facilities in order "to determine the compliance status of all Federal stationary sources of air pollutants which are subject to Federal, State, and local emission limitations and establish firm public commitments to abate emissions as expeditiously as practical from those facilities exceeding limitations." [47] The E.P.A. Administrator, stating that Section 118 of the Act required federal facilities to meet state emission standards, directed federal facilities to supply to E.P.A. and state air pollution commissions various emission data; the Administrator also set up a detailed procedure for ensuring compliance with Section 118 through specific timetables which E.P.A. and the state agencies will monitor.[48]

As in *Train* v. *Natural Resources Defense Council, supra,* slip op. 25, the interpretation by E.P.A. of Section 118 is entitled to great weight; E.P.A. is "charged with the administration of the Act" and, we submit, its interpretation is not only reasonable, but also correct in light of the Act as a whole and the history surrounding it. See also *Udall* v. *Tallman,* 380 U.S. 1, 16–18.

Moreover, as the Conference Committee report stated, the Act gives the President the responsibility of ensuring that federal facilities comply with Section 118. On December 19, 1973, the President issued

[47] 40 Fed. Reg. 20664.

[48] *Id.* at 20664–20665.

Executive Order 11752 [49] concerning the prevention, control and abatement of environmental pollution at federal facilities. After stating that the Clean Air Act and other statutes required federal facilities to comply with state substantive standards and limitations regarding pollution, the Executive Order—agreeing with the earlier interpretation of Section 118 by E.P.A.—made clear that in "light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control." [50]

Moreover, the Administrative Conference of the United States has spoken to the issue in this case and has recently recommended to the President, the Congress, and the Judicial Conference of the United States various procedures for ensuring compliance by federal facilities with environmental quality standards.[51] In the view of the Administrative Conference, the Clean Air Act requires "agencies with control over federal facilities to comply with both federal and non-federal pollution control standards," but the Act does not "specifically authorize procedures for [its] enforcement where federal facilities are concerned." [52] Since according to the Administrative Conference even a decision by this Court in favor of petitioner "will

[49] 38 Fed. Reg. 34793–34797.

[50] *Id.* at 34793. The E.P.A. guidelines issued on May 6, 1975, implement Executive Order 11752. See 40 Fed. Reg. 20664.

[51] 40 Fed. Reg. 27925, 27928 (July 2, 1975).

[52] *Id.* at 27928.

leave substantial procedural problems,"[53] the Conference has proposed amending the Act to vest the responsibility for developing procedures in a single federal agency which "should consider the use of emission control permits where they are not now employed." 40 Fed. Reg. at 27928.

In sum, in light of the wording of Section 118, the other provisions of the Clean Air Amendments of 1970, the legislative history of that section, the amendments as a whole, and the interpretation by E.P.A. and the President, we submit that federal facilities are not required by Section 118 to seek and obtain state operating permits. If a contrary result is thought desirable, although the Administrative Conference has proposed otherwise, this is a matter for Congress. Indeed, we are informed that the Subcommittee on Health and Environment of the House Committee on Commerce is now considering whether Section 118 should be amended to subject federal facilities to state permit procedures.

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[53] *Ibid.* The Administrative Conference points out that there are more than "20,000 [federal] facilities, ranging from huge military establishments, national parks, and systems of prisons and veterans' hospitals to individual fish hatcheries, Coast Guard stations and research laboratories." *Ibid.* (For a listing of the different kinds of federal facilities and their locations, see S. Doc. No. 91-10, 91st Cong., 1st Sess (1969) ("Air Pollution Abatement by Federal Facilities").)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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